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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. REGULO JESUS PAYAN, Defendant and Appellant.	B208794 (Los Angeles County Super. Ct. No. A887958)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Carlo A. Spiga, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

Regulo Jesus Payan, also known as Leopoldo Ruiz and Mario Gutierrez, appeals from the judgment entered upon his conviction by jury of first degree murder (Pen. Code, § 187, subd. (a)).[1] The jury found to be true the firearm allegation within the meaning of section 12022.5, subdivision (a). The trial court sentenced appellant to state prison for 25 years to life plus two years for the firearm enhancement. Appellant contends that the trial court erred (1) in allowing evidence of a prior felony conviction and his probationary status as evidence of flight, and (2) in allowing admission of hearsay evidence from Department of Motor Vehicles (DMV) records, obtained through the California Law Enforcement Telecommunications System (CLETS), linking appellant to a vehicle involved in the incident.

We affirm.

FACTUAL BACKGROUND[2]

The prosecution's evidence

The fight

On January 12, 1988, at approximately 7:00 p.m., Sergio Lopez-Portillo (Sergio), Adrian Lopez-Portillo (Adrian), Salvador Meza (Meza), Peter Ybarra (Ybarra) and Eddie Verdugo (Verdugo) were drinking beer and smoking marijuana in front of 819 Lark Ellen Avenue, in the City of Azusa, when they saw four Hispanic men, including appellant, pushing a station wagon. One of the men threw a bottle that shattered near Verdugo. Verdugo and Sergio approached the men, and the two groups cursed at, and fought with, each other.

The men with the station wagon began running to a nearby Stop-N-Go market. Sergio and Verdugo chased three of them, including appellant and the man who threw the

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Not surprisingly, as trial was held 20 years after the charged murder occurred, there were numerous discrepancies in witnesses' testimony regarding the details of the incident. We do not endeavor to point out all of them.

bottle, Anastacio Jurado Arostegui (Arostegui), into the market. Inside, Verdugo fought with one man, and Sergio fought with appellant.

After the store clerk said she was calling the police and told the combatants to leave, Verdugo and Sergio chased appellant and the other two men outside. As they were leaving, appellant pointed at Verdugo and Sergio and said, "Tu, si," meaning "It's you," and to Adrian, Meza and Ybarra, "Tu, no," meaning "not you," in Spanish. Appellant ran through the parking lot to some apartments.

The shooting

Shortly thereafter, a blue pickup truck "come [*sic*] out of nowhere," jumped over an island and a curb, pulled into the Stop-N-Go market parking lot and stopped 15 feet from Verdugo and his friends. Verdugo and Sergio approached the truck. Appellant got out of the driver's side holding a gun and shot Verdugo. He also shot at Sergio but missed. An unidentified person got out of the passenger seat, waving a gun. According to Adrian, the driver's gun looked like a .38-caliber, and the passenger's gun looked like a semiautomatic. The attackers jumped back into the truck and drove away. Verdugo died from a bullet wound to the chest.

The investigation

Azusa Police Officer Ray Zamora responded to the scene of the shooting and impounded the station wagon. DMV records showed that Douglas Ashbridge White had been its registered owner but that he transferred ownership to appellant on July 11, 1987.

On January 13, 1988, at 8:00 a.m., Officer Eric Sanchez was looking for suspects at the condominiums and apartments near the Stop-N-Go market. He detained Arostegui as he was leaving apartment B, at 761 Lark Ellen (Apartment B). During a search of that apartment, officers found two letters and a tax document addressed to appellant and a police department arrest worksheet with his name on it.

Four days later, Detective Frank Chavez met Arostegui at Apartment B, as people were moving out. A second search of the apartment uncovered a vehicle "pink slip" to a 1978 Chevrolet pickup truck, a social security card, and a vehicle registration with the

name Cirilo Payan Jurado (Cirilo) on them.[3] Officers also found nine unspent .38-caliber bullets, a leather firearm holster and a motel key.[4] They also located a certificate in the name of Anselmo Payan and a large photograph with the name Cirilo written on it. In one of the bedrooms, the detective found a dental receipt and a 1986 document from the tax collector with appellant's name on them.

Detectives prepared three photographic six-packs; one containing the photograph of appellant, obtained by Detective John Momot from the Long Beach Police Department,[5] one containing the photograph of Cirilo and a third containing a photograph of Arostegui. On January 18, 1988, after admonishing them, detectives showed the six-packs to Ybarra, Meza, Adrian and Sergio separately. No one identified Arostegui.

Sergio selected appellant as the person with whom he fought in the Stop-N-Go market and as the shooter. He did not select anyone in the other six-packs. But he could not pick appellant out of a live lineup conducted on June 28, 2007, shortly after appellant's April 16, 2007, arrest. However, from the time of his arrest until the lineup, appellant went from having a small goatee to having a full beard. Sergio did identify appellant as the shooter at the July 17, 2007, preliminary hearing and in front of the jury, testifying that he could "never forget that face. . . . That's haunted me for 20 years."

Adrian also identified appellant in the six-pack as the shooter. But Adrian was 70 yards from the shooter, had been drinking on the day of the shooting, and, from where he stood, could only see the left side of the shooter's face. Adrian also identified Cirilo in a

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[3] Agapito Payan (Agapitio), appellant's father, testified that Payan was his family name and Jurado was his wife's family name, but that he did not have a son or relative named Cirilo.

[4] A bullet recovered in the autopsy of Verdugo was most likely a .357- or .38-caliber.

[5] The photograph of appellant was a booking photograph for a December 13, 1985, robbery arrest. The booking board on the picture, which included appellant's name, the date of the arrest and a booking number, was covered in the six-pack.

six-pack as part of the station wagon group who fought with Verdugo in the market. He too was unable to pick appellant out of the live lineup.

A forensic firearm specialist testified that a bullet taken from the body of Verdugo, was consistent with bullets loaded into a .38 special caliber or .357-caliber cartridge. The nine rounds taken from Apartment B and the bullet from Verdugo's body were capable of being fired from the same gun.

Appellant's probationary status

Appellant was convicted of a felony in December 1984 and sentenced on February 20, 1985, to three years' felony probation which was to terminate on February 19, 1988.[6] He was supposed to report to probation at the beginning of each month, either by mail or in person, and did so through January 1, 1988. He failed to report in February 1988, the month after Verdugo's murder, and his probation was revoked on February 18, 1988.

The defense's evidence

Ybarra was called by the defense. He claimed that no fight broke out between Verdugo and Verdugo's friends and the group pushing the station wagon. He heard four or five shots. Ybarra was unable to identify appellant as being at the scene of the shooting, though he recalled that the driver of the truck was the shooter.

Agapito, appellant's father, testified that on December 14, 1987, appellant came to Rancho Del Arco, Mexico to attend his uncle's funeral. Appellant became ill and was treated by Dr. Jose Andres Rios Ontiveros.

Dr. Ontiveros testified that he treated appellant for pneumonia in Mexico between January 2, 1988 and January 19, 1988. He saw appellant on January 2, 1988, again between January 8 and 12, 1988, and once more on approximately January 17, 1988. Dr. Ontiveros said that appellant could not travel when being treated. The doctor had never seen appellant before or after this period and had no records reflecting these visits

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6 Appellant was arrested on another felony charge in 1985, which was filed as a probation violation. He was found in violation of probation, but probation was reinstated.

or his ever treating appellant. Dr. Ontiveros did not recognize appellant in court or in the photographic six-pack. He did not remember his height, weight, eyes, facial hair, or age, and, in fact, would not have even remembered his name except that Agapito told him.

Dr. Mitch Eisen, a psychologist and director of Forensic Psychology Program at California State University at Los Angeles, testified to inaccuracies associated with memory and recall of events, the inherent biases of six-pack photographic lineups and how they can lead to false identifications. He testified that memories do not operate like cameras, though he acknowledged that "[p]eople can and do make accurate identifications all the time."

DISCUSSION

I. The trial court did not abuse its discretion in allowing the prosecution to admit evidence of appellant's prior offenses and probationary status

A. The motions in limine

Before trial, appellant made two motions seeking to limit admission of evidence. One motion sought to preclude testimony from appellant's probation officer that appellant was on probation for a 1984 felony conviction when the charged offense occurred. Appellant had only one month left before probation terminated, when he stopped his required monthly reporting to his probation officer, thereby violating probation. The trial court found the testimony relevant to appellant's consciousness of guilt and ruled that the probation officer's testimony was admissible. It limited that testimony, however, to stating that appellant was on felony probation, without identifying the offense of which he was convicted.

The second motion sought to exclude evidence of a 1985 robbery and 2006 kidnapping on the ground that they constituted improper propensity evidence and their prejudice outweighed their relevance under Evidence Code section 352. The prosecutor argued that that evidence was not being introduced as propensity evidence, but to prove that the person identified by witnesses in a photographic six-pack in 1988 was appellant, as 20 years had passed between the murder and trial. The photograph in the six-pack was a booking photograph for a 1985 robbery which contained a booking number, date and

appellant's name. The booking number was used to obtain the fingerprint cards related to that arrest, which were going to be used to link the photograph to appellant by comparing them with appellant's fingerprints taken at trial. The trial court found the evidence relevant and not unduly prejudicial but precluded the prosecution from identifying or presenting any of the underlying facts of the prior felony conviction.

During trial, over defense objection, the prosecution introduced the testimony of latent print examiner Fred Roberts, who rolled appellant's prints and compared them with print cards kept by the Department of Justice for "Regulo Payan." The redacted Department of Justice print cards from prior offenses were introduced into evidence. Roberts concluded that the prints from the Department of Justice and the prints of appellant taken during trial matched.

B. Contention

Appellant contends that the trial court erred in permitting the prosecution to introduce evidence of his prior felony convictions and probationary status as evidence of flight and consciousness of guilt. He argues that its questionable relevance was outweighed by its prejudice because "there was a wealth of circumstantial evidence independent of appellant's felony conviction and subsequent absconding from probation that tended to show the appellant took flight after the crime. He abandoned his car and apartment and was not seen or heard from in the State of California for some 19 years." This contention is meritless.

C. Standard of Review

The trial court has broad discretion in determining the relevance of evidence. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) "Review of a trial court decision pursuant to Evidence Code section 352 is [also] subject to abuse of discretion analysis. [Citations.] 'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or

consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "When the question on appeal is whether the trial court has abused its discretion, . . . [a]n appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "'[I]n most instances the appellate courts will uphold its exercise whether the [evidence] is admitted or excluded.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.)

D. Analysis

1. Evidence of probationary status

The trial court did not abuse its discretion by allowing evidence that appellant was on probation for a 1984 felony at the time of Verdugo's murder. "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) But even relevant evidence may be excluded if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

a. Relevance

Conduct reflecting consciousness of guilt is relevant to whether a defendant is guilty of the charged act. (*People v. Schmeck* (2005) 37 Cal.4th 240, 290-291.) Evidence of flight may be relevant to a consciousness of guilt. (*People v. Abilez* (2007) 41 Cal.4th 472, 521; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1030.) At the time of Verdugo's murder, appellant was only days away from successfully completing felony probation. Though he had faithfully reported to his probation officer for nearly three years, he nonetheless failed to report on his last reporting date in February 1988, the first reporting date after Verdugo's murder. This evidence was relevant to show flight. By failing to make one last probation appearance, appellant risked a state prison sentence for his

underlying felony. The fact that the probation was felony probation was relevant to show that the consequences for failing to appear were serious, supporting an inference that the reason for the failure must also have been serious; a murder charge. Hence, the gravity of the consequences for failing to complete probation enhanced the inference that fleeing from a murder charge was appellant's motivation.

b. Prejudice

Appellant did not suffer undue prejudice from this evidence, and what prejudice there was, was clearly outweighed by its relevance. While evidence of past misconduct has the potential of causing a jury to believe that the defendant is a bad person and therefore is more likely guilty of the charged crime, that prejudice was mitigated here. The focus of the evidence was not on appellant's prior felony but on the fact that the probation violation gave him much to lose by fleeing before completing probation. The trial court's refusal to permit the prosecution to reveal the nature of the offense or its underlying facts further diminished its prejudicial impact.

Appellant argues that prejudice from the evidence of his 1984 felony probation outweighed its relevance because it was cumulative of other evidence that he had fled, including that he left his apartment and abandoned his vehicle. But the felony probation evidence did not become irrelevant solely because it was cumulative of other evidence. (*People v. Smithey, supra,* 20 Cal.4th at pp. 973-974.) Moreover, it had an aspect to it not found in the other evidence of flight. There were negligible legal consequences to appellant for leaving his apartment and abandoning his car. The probation evidence, on the other hand, not only showed flight, but the grave legal consequences of fleeing, and hence the seriousness of that which motivated it.

2. Fingerprint evidence from prior offenses

a. Relevance

Appellant presented an alibi defense, claiming that he was in Mexico being treated for pneumonia when Verdugo was murdered. The murder had occurred nearly 20 years before appellant was apprehended and tried, making identification more difficult due to fading memories and changes in appellant's physical appearance with age.

Consequently, the central issue before the jury was whether appellant was Verdugo's murderer.

Key evidence of appellant's identity was the 1988 eyewitness identifications of the murderer made from a photographic six-pack that included appellant's booking photograph from his 1985 arrest for robbery. In order to prove that appellant was the person in the 20-year-old photograph, the prosecution introduced print cards related to the 1985 robbery. Appellant's fingerprints were rolled during trial and compared to the earlier fingerprint cards. The fingerprint expert was able to ascertain that appellant was the person in the 1985 booking photograph. Linking appellant to the photograph was the most compelling evidence presented that he was the shooter.

Appellant argues that the earlier print cards were "highly prejudicial" propensity evidence. But they were not admitted as propensity evidence but to establish appellant's identity. While Evidence Code section 1101, subdivision (a) precludes evidence of prior bad conduct and offenses to prove propensity, subdivision (b) of that section provides that that does not preclude admission of evidence of prior offenses "when relevant to prove some fact . . . other than his or her disposition to commit such an act."

b. Prejudice

The evidence of appellant's prior offenses was not unduly prejudicial. It was not inflammatory, as the trial court sanitized the documents so as not to reveal the type of offenses appellant committed or any information regarding them. The jury learned that the 1985 arrest did not result in filing of new charges but was only treated as a probation violation. Probation was ultimately reinstated, suggesting that the arrest was for a minor offense.

The relevance of this evidence to the central issue in this case far outweighed any prejudice.

II. Hearsay evidence

A. Background

During questioning of Officer Zamora, the prosecution elicited testimony linking appellant to the station wagon involved in the incident. On January 12, 1988, Officer

Zamora impounded a green station wagon near the Stop-N-Go market. Over a defense multiple hearsay objection, the prosecutor had Officer Zamora testify to the contents of DMV printouts, including a "Release of Liability" form, concerning the station wagon which indicated that its registered owner was Douglas Ashbridge White and that, on July 11, 1987, the vehicle was transferred to appellant as the purchaser.

B. Contentions

Appellant contends that the trial court erred in admitting hearsay evidence from the DMV documents. He argues that that evidence contained double hearsay and did not qualify under the official records exception to the hearsay rule contained in Evidence Code section 1280.

Respondent contends that appellant has forfeited a portion of this claim by only objecting to one level of hearsay and not to the statements made by the registered owner on the "Release of Liability" form filed with the DMV.

C. Forfeiture

A prerequisite to raising an issue for appellate review is an objection in the trial court on the same grounds as urged on appeal. (*People v. Derello* (1989) 211 Cal.App.3d 414, 428.) But a specific objection requires no set form of words. (See *People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) An objection made in substance can be reviewed, although its form is technically incorrect. (See *People v. Coleman* (1988) 46 Cal.3d 749, 778.)

Appellant's objection to the information from the DMV records and sidebar discussion convinces us that both levels of his hearsay objection were preserved. Defense counsel objected to the testimony on ground that it called for "multiple hearsay." During a sidebar discussion defense counsel stated: "My objection is the information I've got in the system is one level of hearsay, and then there's another level of hearsay when he relates from a report as to this answer. That may—there may be an exception to that level of hearsay; however, I don't' think there's an exception to the other level." Defense counsel also explained: "But who placed that information into the system that this individual is the buyer is the level of hearsay that I believe can't be explained."

While inartfully expressed, we nonetheless conclude that the objections, fairly read, were sufficient to preserve appellant's contention as to both types of hearsay; the DMV record and the statement of the seller in that record that the vehicle was sold.

D. Hearsay

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) It is generally inadmissible. (*Ibid*.)

An exception to this general rule of exclusion exists for "official records." (Evid. Code, § 1280.) Evidence Code section 1280 states the exception as follows: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Respondent relies upon a purported analogy between this case and *People v. Martinez* (2000) 22 Cal.4th 106, 129 (*Martinez*) in arguing that the official records exception is applicable to the DMV records, including the "Release of Liability" form filed by the transferor of the station wagon, indicating transfer to appellant. *Martinez* concluded that the official records exception to the hearsay rule was applicable to CLETS records containing criminal history information about an individual. But *Martinez* emphasized that the reporting of the criminal history information to CLETS was by sheriffs, chiefs of police, city marshals, courts that dispose of criminal cases and other state agencies. Because the suppliers of the information to CLETS were state agencies, the statutory presumption that "official duty has been regularly performed" (Evid. Code, § 664) established the accuracy of the records.

With respect to the DMV records involved in this case, the suppliers of the vehicle transfer information to the DMV are not state agencies but ordinary citizens. The statutory presumption is inapplicable to establish that correct records have been provided

in a timely fashion so that DMV records are up to date. There are, of course, other indicia of accuracy here which might compensate for the inapplicability of the statutory presumption. For example, Vehicle Code sections 5900 and 5902 impose short time limits after a transfer of a vehicle for documentation related to the transfer to be filed with the DMV. Also, the filing of the "Release of Liability" form (Veh. Code, § 5602), setting forth the information regarding the transfer, allocates criminal and civil liability between the transferor and transferee, providing some assurance that they will both have an interest in promptly and accurately reporting the transfer. Further, section 115 makes it a felony to knowingly offer a false instrument to be filed or recorded in any public office in this state. This provides additional assurance that the forms filed with the DMV will be accurate. The DMV is required to file each application received for the registration of a vehicle and maintain those records. (Veh. Code, § 1800.) We need not, however, resolve this thorny question of whether, all circumstances considered, the official records exceptions applies in this case. For even if the trial court erred in admitting the evidence from the DMV documents showing the transfer of title to the vehicle to appellant, that error is harmless.

E. Harmless error

Erroneous admission of evidence is harmless if it is not reasonably probable that appellant would have obtained a more favorable result had it been excluded. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019; *People v. Jordan* (2003) 108 Cal.App.4th 349, 366.) It must be shown that the erroneous admission of evidence led to a miscarriage of justice. (Evid. Code, § 353, subd. (b).) We cannot so conclude here.

The evidence against appellant was solid. Appellant was identified in a photographic lineup shortly after the shooting by Adrian and Sergio, with whom appellant fought in the Stop-N-Go market. Both also identified him at trial. Appellant fled after the shooting and was not found for nearly 20 years, evidence of consciousness of guilt. Moreover, appellant's defense at trial, rather than helping him, must have been seen by the jury as a fabricated, desperate attempt by a guilty man. Appellant presented Dr. Ontiveros, a physician, who claimed to have treated him in Mexico for pneumonia

during the week that the murder occurred. But Dr. Ontiveros did not treat him before that time or after, could not identify him, and had no records relating to appellant, yet was incredulously able to testify as to the dates of three appointments which he had with appellant nearly 20 years earlier. In fact, Dr. Ontiveros did not even remember appellant's name, but was provided that information by appellant's father who accompanied him to the trial from Mexico and provided the doctor with a place to stay at his other son's residence while attending trial.

Additionally, evidence of appellant's ownership of the station wagon was admitted only to establish appellant's presence at the crime scene during the incident. However, it only established that he owned the vehicle, not that he was present. Moreover, there was other evidence tying him to the crime scene. As stated above, he was identified by both Sergio and Adrian at trial and in a six-pack shortly after the murder as one of the persons pushing the station wagon, running into the Stop-N-Go market and shooting Verdugo. In an apartment near the shooting scene, documents with appellant's name on it were seized, indicating that he frequented the area. In the same apartment, a pink slip was found to a pickup truck similar to the one in which the shooter arrived at the parking lot and shot Verdugo.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ